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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 41

JOHN W. McCONNELL, JR., JOSEPH N. LANGAN, WILLIAM M. WILLIAMS, JR. and GARET VAN ANTWERP,

Appellants-Intervenors,

versus

BETTYE FRINK, Secretary of State of the State of Alabama; B. A. REYNOLDS, Judge of Probate of Dallas County, Alabama; FRANK PEARCE, Judge of Probate of Marion County, Alabama; et al.,

Appellees-Defendants,

M. O. SIMS, et al.,

Appellees-Plaintiffs,

R. E. FARR, et al.,

Appellees-Intervenors,

DAVID J. VANN, et al.,

Appellees-Intervenors.

On Appeal from the United States District Court for the Middle District of Alabama, Northern Division.

BRIEF FOR THE APPELLANTS

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HAUSER PRINTING CO., INC., NEW ORLEANS

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BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the District Court (R. 137-156) from which this appeal is taken is reported at 208 F. Supp. 431. An earlier opinion of the same Court in the same proceeding (R. 62-65) is reported at 205 F. Supp. 245.

JURISDICTION

The decree of the three judge district court was entered on July 25, 1962. The notice of appeal (cross appeal) of Appellants (R. 204) was filed on September 24, 1962. The order noting probable jurisdiction (R. 206) was entered on June 10, 1963. Jurisdiction of this Court is conferred by 28 U.S.C., §§ 1253 and 2101(b).

QUESTION PRESENTED

The sole question presented by this appeal is whether the Fourteenth Amendment to the United States Constitution requires that each citizen of a State have equal representaiton in the legislative process as a whole, i.e., that representation in both houses of a two-house state legislature be based on a reasonable or rational population basis.

STATUTES INVOLVED

The Civil Rights Act, 17 Stat. L. 13, 42 U.S.C., § 1983 is the Federal Statute involved, and Section 1 of Amendment Fourteen to the Constitution of the United States[1] is that portion of the Federal Constitution involved. Section 50, Article IV, Section 197 through 200, Article IX, and Section 284, Article XVIII of the 1901 Constitution of Alabama[2] are the provisions of the Constitution of that State involved. Sections 1 and 2 of Title 32, Code of Alabama (1940, as amended), are the statutes of that State involved. Each of these Statutes and Constitutional provisions are set out in full in Appendix A hereto.

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[1] In this brief the Constitution of the United States will be referred to as the "U. S. Constitution."

[2] In this brief the Constitution of Alabama will be referred to as the "1901 Constitution" and earlier constitutions will be referred to in the same manner with the effective date of such constitution. Alabama has had six Constitutions during its history, 1819, 1861, 1865, 1868, 1876 and 1901. See Skinner, *Alabama Constitution Annotated* (1938).

STATEMENT OF THE CASE

This proceeding involves an action for a declaratory judgment and an injunction, arising out of and with respect to the constitutional and statutory provisions for apportionment of representation in both houses of the Alabama Legislature.

The organic law under which the State of Alabama operates is the 1901 Constitution, which provides that the legislative power of the State shall be vested in a legislature consisting of two houses.[3] The house of representatives shall consist of not more than 106 members,[4] and the number of Senators shall be not less than 1/4 nor more than 1/3 of the number of representatives,[5] but with a maximum of 35.[6] The apportionment of the representatives and senators among the several counties of the State of Alabama is provided in the 1901 Constitution itself,[7] but with the constitutional requirement that the number of representatives and senators shall be fixed and apportioned by the legislature among the several counties or districts of the State according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States.[8] The Constitution provides that representation in the legislature shall be based upon population and such basis of representation shall not be changed by constitutional amendments.[9] Despite the clear mandate of this Constitution, neither house of the Legislature has been reapportioned since the adoption of the 1901 Constitution. (R. 15)

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[3] Section 44, Article IV, 1901 Constitution.

[4] Sections 50, Article IV, and Section 198, Article IX, 1901 Constitution.

[5] Section 197, Article IX, 1901 Constitution.

[6] Section 50, Article IV, 1901 Constitution.

[7] Sections 202 and 203, Article IX, 1901 Constitution.

[8] Sections 199 and 200, Article IX, 1901 Constitution.

[9] Section 284, Article XVIII, 1901 Constitution.

This proceeding was initiated by the filing of a bill for declaratory judgment on August 12, 1961, which was amended by the Plaintiffs on August 26, 1961. (R. 1) This amended complaint was the one on which the hearing was held and, in general, prayed for the Court (a) to declare certain rights of the Plaintiffs (R. 26-27), (b) to enjoin certain state and political party officials in the State of Alabama from taking certain specified actions (R. 27-32), and (c) to direct that members of the Alabama Legislature in the elections to be held in 1962 be elected on an at-large basis under certain specified conditions. (R. 32)

Answers to the Amended Complaint were filed by certain of the named Defendants. (R. 40, 41, 43) Motions to intervene as party plaintiffs were filed on behalf of certain other parties (R. 44, 59, 67), which motions were granted by various orders of the Court. (R. 47, 65, 76) On March 29, 1962, Plaintiffs filed a motion for a preliminary injunction, enjoining certain of the Defendants from taking certain action with regard to the primary elections to be held in the State of Alabama in May, 1962. (R. 47-50) By order of Court entered on March 30, 1962 (R. 57), a hearing was held on this motion on April 14, 1962. At the conclusion of this hearing, the Court entered an order denying said application and setting out its reasons therefor in a brief opinion. (R. 62) In that opinion the Court (a) deferred action to give the Legislature another opportunity to act, (b) continued the application for injunction and reset the hearing thereon for July 16, 1962, and (c) set out certain preliminary remarks for guidance of counsel.

These Appellants filed their motion for permission to intervene as plaintiffs in this action on June 27, 1962 (R. 67), which motion was granted on July 2, 1962. (R.

76) On July 2, 1962, Plaintiffs filed a motion for summary judgment. (R. 78) On July 13, 1962, Plaintiffs filed a motion for a preliminary injunction to enjoin certain of the Defendants from taking certain action with regard to an election to be held on an amendment to the 1901 Constitution of Alabama, regarding apportionment of the Legislature, proposed in an Act adopted by the Legislature on July 12, 1962. (R. 93)

Between the hearing in April and the hearing on July 16, 1962, the Legislature of Alabama was called into Special Session by the Governor, at which session two Acts relating to reapportionment of its membership were duly adopted. (R. 106-107) The First Act, No. 93, proposed an amendment to the 1901 Constitution, providing for an apportionment of senators and representatives to the Legislature of Alabama. (R. 114, 157-159) The second Act, No. 91, was a stand-by Act to be effective only if the proposed Constitutional Amendment were not ratified by the voters of the State of Alabama. (R. 111-113 and 160-162)

The hearing was held before the three judge Court on July 16, 1962. (R. 130-135) The Court entered its opinion on July 21, 1962 (R. 137) and its decree in accordance therewith on July 25, 1962. (R. 175) In general, the Court (a) held that the then apportionment of both houses of Legislature of Alabama constitutes "invidious discrimination" in violation of the Equal Protection Clause of the Fourteenth Amendment (R. 144), (b) held that Act No. 93 (termed the "67-Senator Amendment") and Act No. 91 (the stand-by legislation and termed the "Crawford-Webb Act"), are obviously discriminatory, arbitrary and irrational, and, therefore, failed to meet the necessary constitutional requirements (R. 146), (c) adopted the provisions of Act No. 93, as to

the House of Representatives (R. 155 and 177), (d) adopted the provisions of Act No. 91 as to the Senate (R. 155 and 178-179), (e) enjoined and directed certain defendant officials to hold elections for members of the Legislature, as set out in the opinion and decree (R. 180), (f) held that the apportionment made by the Court in its decree would remain until altered by the Alabama Legislature in accordance with Constitutional requirements (R. 188), and (h) retained jurisdiction of the cause for the purpose of issuing any and all additional orders that may become necessary and appropriate in the judgment of the Court. (R. 190)

SUMMARY OF ARGUMENT

The Court below erred in failing to apportion, or to set out guide lines for the Legislature to follow in apportioning, both houses of the Legislature of Alabama, according to the Constitutional standard or norm of population.

By the very nature of representative government, equality of representation of the individual citizen in the legislative process is basic to the fundamental constitutional concept of due process and equal protection of the laws. Prior to the evolution of representative government, the individual citizen participated directly in the functions of government and, as such, his vote and voice in governmental affairs was equal to that of other citizens. It was not the intention of the citizen, in establishing representative government by a written constitution or compact, to give up this equality of voice in his government. Such equality must not only obtain in the process of selecting representative, but, through equality of the representative, in the legislative process itself. This is part and parcel not only of representative government but of the democratic principle of rule by the majority.

The concept of equality of representation of each citizen has been a touchstone of the political and legal philosophy since the inception of this nation, beginning with the Declaration of Independence and The Northwest Ordinance, adopted by the Congress under the Articles of Confederation, both anti-dating the Federal Constitution. Such concept has also been part and parcel of each of the Constitutions under which the State of Alabama has operated since its admission into the Union in 1819.

Alabama is governed by the 1901 Constitution, which not only provided for the initial apportionment of representation in the two houses of the State Legislature, but required reapportionment of both houses after each Federal decennial census. However, aside from certain constitutional amendments proposed from time to time, no Act to reapportion itself was adopted by the Legislature of Alabama until its Special Session in 1962. The basic theme of that Constitution, with regard to apportionment of the Legislature, is that it shall be based on population. However, there are certain detailed provisions in the Constitution that might conflict with and dilute this right of equal representation in the legislative process. This the lower Court recognized, but did not rule upon, and followed in its reapportionment plan.

The rights which Plaintiffs claim to have been infringed are individual rights, and not the rights of any minority group or of any geographical area or of any classification of citizens. Although the Court has recognized that states may place certain qualifications on the suffrage right of its citizens, so long as such classification is reasonably related to that right, it does not allow any discrimination in the exercise of the right, once it has been granted. This follows whether the discrimination be because of race, color or sex or because of improper use of a qualification otherwise constitutionally

proper. Not only is the right of suffrage protected in preliminary requirements, primary elections and the equality of the ballot in the election itself, but also in the equality of the effect of that ballot in determining the results of the election. The equality of the vote may not be diluted by discriminatory districting or by any system of weighting. The concept of one person, one vote, is basic and permits no deviation nor dilution.

At issue is not only the constitutional principle of equal protection of the laws, but equality in the making of these laws. Minorities may be protected and the political initiative may be properly diffused throughout the political system by means other than minority control of the legislative process. Minority control or process is not due process. Equality of representation means equality in the **entire legislative process** and where that process is delegated to a legislature of two houses, then there must be equality of representation in **each** house.

ARGUMENT

1. *Equality of representation in the legislative process is basic to the fundamental constitutional concepts of due process and equal protection.*

Among the basic political principles under which the United States of America and the States composing that federal union operate are those recognizing the political equality of all persons, that all political power is inherent in the people, and that all free governments are founded on the authority and instituted for the benefit of the people.[10] Such political power encompasses the legislative or law making authority, the executive or administrative authority, and the judicial or the controversy deciding

[10] As examples see Sections 1 and 2 of Article I (Declaration of Rights), 1901 Constitution.

authority. All of these powers, however, are inherent in and founded on the authority of the people.

In classical antiquity, epitomized by Greece in the fifth and fourth centuries, B.C., with its city-states in which the idea of man's innate dignity and worth first crystalized, the small number of citizens and the limited area of the political unit permitted personal and direct participation in the exercise of the powers of government. Greek political leaders, such as Aristotle, deemed this direct personal participation so vital that any organization or political framework larger than the average city-state was opposed and, for that reason, was never found in that particular era.

However, with the tremendous increase in the population and the size of the geographical area comprising the political units in more recent times, such direct participation by the members of the political unit in the day-to-day exercise of the legislative, executive and judicial powers was no longer feasible. Thus arose the idea and the theory of representative government, in which the citizen members of the political unit selected agents or representatives to act for them in the exercise of these political powers. Concomitant with this theory of representation was the idea of the compact or constitution among the people which governed and determined the relations and status of the members of the political unit. This compact or constitution established the political unit, the powers, or limitation on the powers, of the government established by the people to direct the affairs of the political unit, and the method of the selection of the agents or representatives of the people who would exercise the three basic political powers of the political unit.

Inherent in all such compacts or constitutions are the concepts that the powers granted by the people to the

government are limited, that those powers not specifically or necessarily granted are retained by the people, and that the government and the representatives are subject initially to the constitution or compact and ultimately to the people.

Political equality of the citizen was inherent in the direct participation in the affairs of the state by the fact that each citizen had a right to voice his opinion in the deliberations and discussions and to cast a vote, which was equal to the vote of any other citizen, in making decisions. This political equality was continued in the republican or representative form of government by granting each citizen an equal vote in the selection of the representatives to act for and in his behalf and by requiring that each representative represent, as nearly as possible, the same number of citizens.[11]

In banding together in a political society, the politically equal members recognized the rule of the majority in the elective and legislative processes of the government, unless some number greater than a majority was agreed upon in the constitution or compact. Majority rule was necessary in order to determine when and how the actions of the representatives would be made and become binding. The simplicity of this rule is that there can be at any one time and on any one question only one majority; whereas, at the same time and on the same question, there can be any number of minorities, ranging from a minority of one to a minority of one less than one-half of the total.[12]

There is no impartial method of determining which

[11] See *Moss v. Burkhart*, 207 F. Supp. 885, 893 (W.D. Okla., 1962); *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865, 869 (1907); *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W. 2d 315, 321 (1931); *Asbury Park Press, Inc. v. Woolley*, 33 N.J. L. 1, 161 A. 2d 705 (1960).

[12] See John Locke, "An Essay Concerning the True Original, Extent and End of Civil Government," Chap. 95-97.

minority should control or have the determining voice (except in the recognition of plurality whereby the largest minority, where there is no majority, would control). Control by minorities actually derogates from, and is contrary to, the purposes of political union.

Another cogent argument for majority rule is the ever present right of a minority to become a majority by attracting to its side members of the majority by force of persuasion or reason. Majority rule, however, is subject at all times (1) to the limitations on the exercise thereof prescribed in the basic compact or constitution and (2) to certain basic individual rights which no individual, in becoming a member of a political unit, surrenders to the control of such political unit.[13]

The most active and far reaching exercise of governmental power is legislative, the making of rules binding upon the community. Basic in our concept of constitutional government is the idea of a government of law and not of men. If these laws are to represent the views and opinions of, and are to be acceptable to, the general citizenry, then the representatives of the citizens must, as accurately and truly as possible, be responsive to the citizens for whom they act and represent. The enactment of general rules governing a society requires careful study of conflicting and complex viewpoints and usually workable or acceptable compromises. Through argument and discussion, the area of agreement is determined in the representative legislature. This symbolizes the consent which legislation presupposes if it is to be compatible with the ideas of the citizen's autonomy and equality in the governmental unit and of majority rule.

The purpose of a government is to govern, which necessitates action. No government which fails to gov-

[13] See, Locke, *ibid.*, Chap. 131.

ern can possibly be just. A just government is one that weighs and considers the conflicting claims, desires and views of its members and makes a decision and acts in accordance with the concept of the common good. In this process, there is a place for both the majority and the minority, the majority participates through acting and the minority participates through discussion and criticism, with the right ever present for the latter, by the persuasive force of its argument and criticism, to become a part of a majority and thus to reverse the decisions and actions of a previous majority.

Thus, the selection of the representatives represent the very core of popular republican government. Unless the individual citizen can effectively voice his thought, opinion, and will through his duly chosen representative, responsible government is not only impossible, but the idea of a constitutional representative political unit, of a government of law and not of men, is a mere mirage.

The abuse of this basic right and concept by King George III was one of the objections made in the Declaration of Independence. " * * * He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature—a right inestimable to them, and formidable to tyrants only."[14] The Northwest Ordinance, adopted July 13, 1787, by the Congress under the Articles of Confederation, which not only antedated the Constitution of the United States but was the basis for the government of the territories and the admission of new states into the Union after the adoption of the Constitution, specifically recognized that the inhabitants of the territory would always be entitled to the benefits of a proportionate representation of the people in the Legis-

[14] 1 Stat. 1.

lature.[15] This was made applicable to Alabama by the Act approved May 10, 1800, authorizing the establishment of a government in the Mississippi territory, of which a portion of present day Alabama was a part, in that representatives in the General Assembly of that territory would be apportioned in the manner described in the Northwest Ordinance.[16]. The Act of March 2, 1819, by which Alabama was admitted as a State to the Union, specifically provided that the Constitution and State government shall not be repugnant to the principles of the Northwest Ordinance.[17] Thus, this idea of equality of representation in the lawmaking branch of the government was guaranteed by the provision that the representatives should be apportioned on the basis of the number of inhabitants.[18]

Equality of representation may be said to require either (1) that each representative shall have an equal number of constitutents or (2) that the share of a constituent in one representative shall be equal to that in each representative. Both would be most perfectly satisfied if the representatives were elected from the entire political unit (at large) by all of the members thereof (state officials, such as the governor in Alabama, are in this category). However, this is not always feasible nor desirable. In the absence of the use of such a method, the determination, and the method of determination, of the political unit, geographical or otherwise, from which and by which the representatives will be selected becomes of paramount importance. Certain basic factors may be involved in the determination of such political unit; (1) are the subdivisions to have one or more than one repre-

[15] 1 Stat. 51-53, f.n. (a).
[16] 2 Stat. 69.
[17] 3 Stat. 608.
[18] See 1819 Constitution, §§ 9 and 10, Code of Alabama (1876), pp. 53, 57.

sentative; (2) the size of the unit both in terms of geographical area and of numbers; (3) the community or diversity of interest of the unit and the persons therein; (4) size of the legisaltive or representative body; and (5) the possible burden on the election process (in terms of communication between candidates or representatives and the electors and the cost of elections, both to the candidate and to the State).

In order to minimize the cost of operation and to maximize the deliberative process of the representative body, the size of the representative body must be limited. With the recent increase in population, the number of constitutents in the political subdivision which the representative represents has increased or there has been a demand to increase the number of representatives. However, where the size of the legislative body has remained constant and the increase in the population of the political subdivisions has been disproportionate, a basic conflict arises. The size of the deliberate body, if equality of representation is to be maintained, requires a definite relationship between the number of electors or inhabitants in the smallest political subdivision from which a representative is selected and the total population of all such subdivisions (that is, the population of the smallest subdivision cannot materially vary from the ratio obtained by dividing the total population of all subdivisions by the total number of representatives in its representative body).

Another factor entering into the basic determination of the political subdivision from which representatives will be selected is the determination of who is to be represented by the representative and be counted in determining the number of persons so represented. As seen earlier, the Northwest Ordinance based representation on the

inhabitants in the territory. The initial Constitution of the State of Alabama restricted this, however, to white inhabitants. This continued to be the rule in this State until the Constitution of 1868, which returned the basis to all inhabitants. This is the present basis for apportionment of representatives.

2. *The District Court's Opinion and Decree were inadequate because of certain provisions of the Alabama Constitution.*

The last apportionment of the senators and representatives of the Legislature of Alabama was based on the 1900 federal census and was established by §§ 202 and 203, Article IX, of the 1901 Constitution. There have been six decennial federal enumerations of the population of the State of Alabama since 1900 and there have been numerous regular and special sessions of the Alabama Legislature since 1910. (R. 16) However, aside from several amendments proposed to the Constitution regarding apportionment of the Senate[19] and Act No. 91 (the "Crawford-Webb Act") passed by the Special Session in 1962,[20] there has been no further apportionment of either house of the Legislature.[21] The District Court re-

[19] The first so-called "67-Senator Amendment" was proposed in 1931 and provided for a senate equal in number to the number of counties and apportioned the senators one to each county. This was decisively defeated by the voters (by a better than 4 to 1 vote). In 1951, a similar constitutional amendment was submitted to the voters and again rejected (this time by a vote of almost 3 to 1). In 1956, the same type of amendment, but coupled with an increase in the membership of the house of representatives to make the latter more fairly apportioned, was submitted to the voters, and was also rejected. Act No. 93, adopted at the Special Session in 1962, was the same 67-Senator Amendment.

[20] The only serious effort to provide not only for current reapportionment but automatic reapportionment in the future was made at a Special Session of the Legislature called by Governor Dixon in 1939. This was the first time that a bill on reapportionment had been reported out of committee, but it was defeated in the House, 60 to 31 and thereafter was indefinitely postponed in the Senate.

[21] See Farmer, *The Legislative Process in Alabama*, pp. 9-29, and Larson, *Reapportionment in Alabama*, pp. 9-25.

ferred to the cumulative effect of the initial apportionment in 1901 and the failure to reapportion thereafter in accordance with the changes in the population of the State, as a whole, and of its subdivisions, and attached to its opinion two appendices illustrating these results. (R. 144, 163-167)[22]

The Court quite properly found that the apportionment of the Alabama Legislature, at the time of the hearing, constituted "invidious discrimination" in violation of the Equal Protection Clause of the Fourteenth Amendment (R. 144, 141),[23] and that neither the 67-Senator Amendment[24] nor the Crawford-Webb Act meets the necessary constitutional requirements (R. 146), noting, as it had done in its Opinion rendered on April 14, 1962, that the Justices of the Supreme Court of Alabama, on two different occasions, had taken judicial notice of the changes in population of the various counties of the State since 1901, the failure of the Legislature to apportion its membership as a result of such changes, and the con-

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[22] In 1901, a majority of the senators (18) was elected from districts containing 41% of the State's population. By 1956, a majority was elected from districts containing 31% of the State's population and, by 1960, 25% of the State's population. At the same times, a majority of the House of Representatives was elected from counties containing, respectively, 42%, 25% and 23% of the State's population. That this minority control of the Legislature is localized and is not geographically disbursed is indicated by the fact that of the counties that could elect a majority of both houses in 1960, 25 of those counties were included in the 33 counties making up the 18 senatorial districts of lowest population and were among the 41 counties of lowest population electing a majority (54) of the House of Representatives.

[23] Citing *Baker v. Carr*, 369 US 186, 82 S Ct 691, 7 L ed 2d 663 (1962); *Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga., 1962); *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga., 1962); *Moss v. Burkhart*, 207 F. Supp. 885 (W.D. Okla., 1962).

[24] Under the 67-Senator Amendment, a majority of that body (34) would be elected from counties having 19.5% of the State's population; whereas, 26 members (a number sufficient to defeat any proposed amendment to the Alabama Constitution) would be elected from counties having 13.4% of the State's population. Thus, in effect, 20% of the population, through their representatives, would control a majority of such a senate and could thus defeat any legislation, and 41% could prevent any proposed amendment to the Constitution.

clusion that apportionment of the Legislature was no longer on a constitutional basis.[25]

The Court, acting reluctantly and with the intent to accept such parts of the two acts adopted by the Legislature that, in the opinion of the Court, would release the stranglehold on the Legislature and permit it to reapportion itself, adopted that portion of the proposed Constitutional Amendment relating to the House of Representatives and that portion of the Crawford-Webb Act relating to the Senate. However, the Court specifically held that this did not meet the standards of constitutionality required of, and would not suffice for, a permanent reapportionment. (R. 155-6)

The Court quite properly found, in its opinion on April 14, 1962 (R. 62, 64), and repeated in its opinion on July 21, 1962 (R. 142, 149), that the controlling constitutional formula which runs throughout the Constitution of Alabama is expressed in the last sentence of § 284 of the 1901 Constitution, to the effect that "Representation in the legislature shall be based upon population" and that if that formula is met, there can be no valid objection under the Equal Protection Clause, or any other part of the U. S. Constitution. However, at the same time, the Court recognized that this clear-cut provision might be diluted by other and somewhat conflicting requirements of the same Constitution. (R. 149)

However, the Opinion and Decree of the District Court are as important for what they did not say, as for what they did say, and for the failure to grant the relief prayed for by Appellants and, particularly, the declaration that, basing representation in either the House of Representatives or the Senate of the Legislature of

[25] *Opinion of the Justices*, 254 Ala. 183, 47 So. 2d 713, 717 (1950); and *Opinion of the Justices*, 263 Ala. 158, 81 So. 2d 881, 887 (1955).

Alabama on any factor other than population would violate the provisions of the Fourteenth Amendment of the U. S. Constitution. (R. 85) Recognizing that its provisional reapportionment did not meet constitutional standards and would not be satisfactory as permanent reapportionment, the Court did not determine (a) what the constitutional norm for apportionment of a bicameral legislature is, (b) that, if this norm is population, does it apply to both houses of a two-house legislature, (c) what deviation from such norm, if any, there may be, and, if there may be deviation, to what extent and how may such deviation be measured, and (d) that, if the norm is population, may this be changed by the citizens of the State and, if so, under what circumstances and to what extent.

The concern of the Appellants over these omissions from the Opinion and Decree of the Court and the basis for their appeal therefrom arises from a study of the provisions of the Alabama Constitution relative to reapportionment. Although the Federal Courts are always reluctant to interpret the laws and constitution of a state, particularly where the highest court of such state has made no interpretation of the provisions in question,[26] where the Court has jurisdiction of the matter, such as the District Court did here under *Baker v. Carr*, *supra*, it also has jurisdiction to interpret the statutory and constitutional provisions in question. *Louisville & Nashville R.R. Co. v. Garrett*, 231 US 298, 34 S Ct 48, 58 L ed 229, 239 (1913). The necessity for such interpretation arises from a dual requirement with regard to any apportionment made by the Alabama Legislature; (1) whether such proposal conforms to the requirements of the 1901 Constitution, and (2) whether the requirements of the 1901

[26] *Railroad Commission v. Pullman Co.*, 312 US 496, 61 S Ct 643, 85 L ed 971 (1941); *Clay v. Sun Insurance Office, Ltd.*, 363 US 207, 80 S Ct 1222, 4 L ed 2d 1170 (1960).

Constitution conform with the standards or norm of the Fourteenth Amendment.

As recognized by the District Court, apportionment by population is the dominant theme throughout the 1901 Constitution and previous Alabama Constitutions. Section 198 (Article IX) of the 1901 Constitution, relative to the House of Representatives,[27] § 200 (Article IX), relative to the Senate,[28] § 39 (Article II), relative to the formation of new counties,[29] and § 284 (Article XVIII),

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[27] "The members of the house of representatives shall be apportioned by the legislature among the several counties of the state *according to the number of inhabitants in them*, respectively, * * * ". See also §§ 8 and 9 (Article III), 1819 Constitution (pp. 56-7), the Third Amendment to the 1819 Constitution (adopted in 1850) (p. 70), § 6 (Article IV), 1865 Constitution (p. 88), § 1 (Article VIII), 1868 Constitution (p. 113), § 2 (Article IX), 1875 Constitution (p. 127) for similar provisions. (All page references are to Code of Alabama (1876).)

[28] "It shall be the duty of the legislature * * * to divide the state into as many senatorial districts as there are senators, which districts *shall be as nearly equal to each other in number of inhabitants as may be*, * * * ". See also § 10 (Article III), 1819 Constitution (p. 56), § 7 (Article IV), 1865 Constitution (p. 92), § 3 (Article VIII), 1868 Constitution (p. 114) and § 4 (Article IX), 1875 Constitution (p. 143) for similar provisions.

[29] " * * * no new county shall be formed unless it shall contain a sufficient number of inhabitants to entitle it to one representative under the ratio of *representation existing at the time of its formation*, and leave the county or counties from which it is taken with the required number of inhabitants to entitle such county or counties, each, to separate representation; * * * ". See also § 16 (Article VI), 1819 Constitution (p. 64), which provided that every new county, as to the right of representation, shall be considered as a part of the county or counties from which it was taken until entitled by numbers to the right of separate representation; § 2 (Article II), 1865 Constitution (p. 91), § 2 (Article II), 1875 Constitution (p. 130) for similar provisions. If the division of the State of Alabama into counties were to be made today, based on the 1960 population and a house of representatives of 106 members, which would give a ratio of representation of 30,607 persons per representative, only 27 of the existing 67 counties could be validly organized into new counties; the remaining 40 counties would have to be joined into combinations to have a sufficient number of inhabitants to meet this ratio of representation. See Amendment CXXXII to the Alabama Constitution adopted in 1957, which provided for the abolition of Macon County by the legislature. This was proposed by the same legislature which by legislative act gerrymandered the City of Tuskegee in the same county and was the subject of the litigation in *Gomillion v. Lightfoot*, 364 US 339, 81 S Ct 125, 5 L ed 2d 110 (1960).

relative to amendment of the Constitution,[30] clearly indicate this dominant theme.

However, despite this emphasis on population as a basis of representation in the Legislature, there are other provisions of the 1901 Constitution that would conflict with or dilute these clear and mandatory provisions. Section 50 of the 1901 Constitution fixes the maximum size of the two houses of the Legislature, the House at 105 plus 1 for each new county formed thereafter, and the Senate at 35.[31] Section 199 provides that the Legislature at its first session after each decennial census shall fix by law the number of representatives, but further provides that each county shall be entitled to at least one

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[30] " * * * Representation in the legislature *shall be based upon population*, * * * ". This section of the Constitution was amended by Amendment XXIV, proclaimed ratified on August 2, 1933, but the above wording was carried over verbatim into the Amendment. It is doubtful if the 1901 Constitution would have been either submitted to the people of Alabama or adopted by them had this specific requirement not been contained in that document. See, *Official Proceedings, Constitutional Convention of 1901, State of Alabama*, Vol. 3, pp. 3906-3924 and the lengthy quotations therefrom in *Opinion of the Justices*, 263 Ala. 158, 81 So. 2d 881 (1955), by four of the Justices, at pp. 886-7 and by three of the Justices at pp. 889-90. One of the dominant issues of the 1901 Constitutional Convention was the question of negro suffrage. The dominant element in the Convention from the Black Belt clearly wished to limit the right of suffrage to the negro. See §§ 177 through 196, Article VIII, 1901 Constitution. At the same time, since the population of this area was predominantly negro, it could not afford to have representation based on the number of voters and insisted that representation be based on the total population. However, the Black Belt was not satisfied with a provision to the effect that representation would be based on population, but there must be a further provision to the effect that this could not be changed by normal constitutional amendments. Both demands were met. *Official Proceedings, Constitutional Convention of 1901, State of Alabama*, Vol 2, pp. 2343 *ff.*, and Vol. 3, pp. 3906 *ff.* See Farmer, *loc. cit.*, pp. 9-29. It is one of the ironies of history that the very section which was so adamant in its demand for representation on the basis of population has, throughout the intervening years, led the fight against implementation of such apportionment on such basis after each decennial census and for amendments providing for apportionment, in at least one house, on a basis other than population. See Comment, "Alabama's Unrepresentative Legislature," 14 Ala. L. Rev. 403 at p. 406 and authorities cited in footnotes.

[31] § 197 provides that the senators shall not be more than ⅓ of the number of representatives, which, if more than three new counties were added to those existing in 1901, could conflict with the specific number set out in § 50.

representative. This provision would allow for the dilution of representation on the basis of population in the House. The Legislature could fix the number of representatives equal to the number of counties, thereby attaining the objective of the several 67-Senator Amendments. However, even if it should fix the number of representatives at the maximum of 106 (one new county having been added since 1901), there remains only 39 representatives, after one is allocated to each of the 67 counties, to account for the disparities of population among the several counties.[32] Couple these requirements with the population trends in the State of Alabama over the last half century and the situation tends to become worse rather than better.[33]

Section 200 of the 1901 Constitution provides that the Legislature, at its first session after each decennial census, shall fix by law the number of senators and shall divide the State into as many senatorial districts as there are senators. However, the same section provides that no county shall be divided **between** two districts. If this latter provision means that no county may be divided **into** two districts, then it will be impossible to apportion the Senate on the basis of population unless the population of the most populous county should be less than the quotient obtained by dividing the total population of the State by the total number of senators in the State.[34]

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[32] With such disparities of population and under the method of equal proportions, the number of persons per representative ranges from 50,718 for Houston County (R. 125) to 10,726 for Coosa County (R. 73), with the average at 30,607 (R. 165).

[33] In 1960, 45 of the 67 counties in Alabama were less populous than in 1950, and 26 were less populous than in 1900. (R. 163-5)

[34] Since the Constitution provides that the number of senators shall not be less than one-fourth of the number of representatives, the most populous county cannot have more than 1/27th of the State's population with a house of 106 members, or 1/17th of the State's population with a House of 67 members. In 1960, the population of three of the counties exceeded such percentage, based on 27 members, and two exceeded such percentage based on 17 members. The population of the two most populous counties represent respectively, 19.6% and 9.7% of the State's population.

3. *The Constitutional standards imposed by the Fourteenth Amendment to the U. S. Constitution require that both houses of a two-house legislature be apportioned in accordance with population.*

It should be noted, and made clear initially, that this is a suit to protect personal rights, those of each Plaintiff and of each citizen of the State of Alabama in whose behalf the action was brought, and is not brought to protect the rights of any minority group, racial, religious or otherwise, nor of any particular area within the State of Alabama, such as urban or rural areas, nor of a particular class of voters or segment of the population. The personal right which Plaintiffs claim have been denied to each of them by the failure of the Alabama legislature to reapportion itself in accordance with the mandate of the laws of that State is the right guaranteed each citizen by the Fourteenth Amendment of equality in the legislative process.[35]

(a) *The right to have one's vote count as equal to that of another is a basic constitutional principle.*

States, are constitutionally permitted, within limits, to establish the qualification of voters or the conditions under which the right of suffrage may be exercised in state and federal elections.[36] However, there must be some rational connection with the qualification and the exercise of the suffrage privilege, such as age, residence, literacy, previous criminal record,[37] and, perhaps, others.

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[35] The Equal Protection Clause relates to equality between persons rather than between areas. *McGowan v. Maryland*, 366 US 420, 81 S Ct 1101, 6 L ed 2d 393, 400 (1961).

[36] *Pope v. Williams*, 193 US 621, 633, 24 S Ct 573, 48 L ed 817, 822 (1904).

[37] *Lassiter v. Northampton County Board of Elections*, 360 US 45, 51, 79 S Ct 985, 3 L ed 2d 1072, 1077 (1959).

However, by reason of the Fifteenth Amendment and Nineteenth Amendment to the U. S. Constitution, States may not deny or abridge the right to vote to negroes or to women, nor can qualifications, otherwise valid, be used as a cloak to discriminate against one class or group of voters.

In protecting the right to vote, the Court will look to the preliminary requirements as well as to the entire election process. Thus, rules and regulations with regard to such preliminary matters as the registration of voters are considered a part of the election process and, if used as a means of discriminating against a class of voters, will be invalidated.[38] The constitutional provisions also extend to the preliminary elections, such as a primary or pre-primary processes.[39]

The right to have one's vote count as equal to another's vote in an election has never been denied or questioned[40] and is a fundamental right essential to the preservation of self government.[40a] However, this protection of the right of suffrage and the value of the ballot does not end with the mere casting of that ballot. In the counting and the effect given to that ballot, the equality of the ballot must continue. If there were any doubt as to this, it was put to rest by the decision in *Gray v. Sanders*, *supra*, declaring invalid the so-called "county unit" system used in Georgia in electing certain state and federal

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[38] *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala., 1949), *aff'd per curiam* 366 US 933, 69 S Ct 749, 93 L ed 1093 (1949).

[39] *Smith v. Allwright*, 321 US 649, 64 S Ct 757, 88 L ed 987 (1944); *United States v. Classic*, 313 US 299, 61 S Ct 1031, 85 L ed 1368 (1941); *Terry v. Adams*, 345 US 461, 73 S Ct 809, 97 L ed 1152 (1953).

[40] "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. * * * " *Gray v. Sanders*, 372 US 368, 83 S Ct 801, 9 L ed 2d 821, 830 (1963).

[40a] *Moss v. Burkhart*, 207 F. Supp. 885, 893 (W.D. Okla., 1962).

officials. This prohibition would apply not only to the prohibitions specifically named in the Constitution, such as giving a value to the ballot of a negro or of a woman different from that of other voters,[41] but also to ballots weighted because of the geographical residence of the voters, the occupation of the voter, the income of the voter or similar classifications. The prohibition would equally extend to those classifications which the Court has recognized as valid in determining the right of suffrage, such as literacy, age and similar factors, because once the right to vote is recognized, there can be no weighting or dilution of that right.

(b) ***The right of a citizen to participate in the legislative process of government is as equally fundamental as his right to vote and as such is subject to the same constitutional requirements of equality and prohibition against dilution.***

The voting for and selection of the representatives who will participate directly in the law-making process of a government is the first step in the operation of a representative government. This procedure is made necessary by the geographic size and population of modern governmental units and the number and complexity of today's problems which prevent the direct participation by all citizens in the day-to-day legislative processes. However, just as the citizen would loudly protest against, and the Court would strike as invalid, any system by which the participation of the citizen in the election of such representatives should be by unequal votes,[42] so should the citizen be indignant at, and the court be equally protective of, the dilution or denial of the equality of

[41] *Gray v. Sanders*, *supra*, p. 829.

[42] See Larson, *Reapportionment and the Courts*, cited in fn. 5 to the District Court's Opinion, 208 F. Supp. 431, 436 (R. 145).

such representative elected by one group of voters to that elected by another group in the actual legislative process itself.

Where the representatives are elected from the political unit as a whole, and by all the electors of that political unit, equality of the citizen in the representative and in the lawmaking process follows. However, where the entire political unit is divided into different geographical areas, or different voter groups or classifications, for the purpose of selecting representatives, the equality of the citizen in the legislative process may be diluted and the individual citizen discriminated against unless such geographical divisions or citizens group or classification are carefully selected to preserve the equality of participation in the process of the citizen in one division or group to that of citizens in another. Just as the participation in the process itself cannot be prevented by geographical districting that may discriminate against certain groups,[43] so should a districting be invalid that, although not prohibiting participation in the process by the citizen, would dilute his equality in such process.[44] This would follow whether the unit from which the representative would be elected was based on race, sex, occupation, economic group,[45] wealth, or geography.[46]

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[43] *Gomillion v. Lightfoot*, 364 US 339, 81 S Ct 125, 5 L ed 2d 110 (1960).

[44] See fn. 4 to Opinion of Mr. Justice Stone in *U. S. v. Carolene Products Co.*, 304 US 144, 152-3, 58 S Ct 778, 82 L ed 1234, 1241-2 (1938); See also Dissenting Opinion of Mr. Justice Douglas, with whom Mr. Justice Black concurred, in *MacDougall v. Green*, 335 US 281, 287, 69 S Ct 1, 93 L ed 3, 9 (1948).

[45] However, see *Levitt v. Maynard*, 104 N.H. 243, 182 A. 2d 897 (1962).

[46] See Dissenting Opinion of Mr. Justice Black in *Colegrove v. Green*, 328 US 549, 566, 66 S Ct 1198, 90 L ed 1432, 1443 (1946).

(c) ***Equality is indivisible; it is a matter of numbers, although mathematical exactitude is not required.***

To recognize and guarantee equality to vote in the selection of representatives and then to take away that equality in the voice of the representative in the legislative body, or process, to or for which elected is to make the first equality meaningless and to deny equality just as effectively as if the vote for the representative initially had been given unequal weight. The concept of one person, one vote, permits no deviation, no dilution and is merely a matter of numbers, of the ratio 1:1.[47] This is not to mean that a state may not apportion representation in its legislative body on a reasonable basis, equally applicable to all citizens within the State, such as total number of inhabitants, qualified electors, or residents over the age of twenty-one years or some other age, so long as the basis is reasonably related to the question of representation.[48] Any such basis, however, is subject to measurement in term of numbers, which enables the equality to be measured and determined. However, once the basis for representation is determined by the State, unless the election of representatives is to be by the State as a whole, the division of the State into smaller units or components must again be on some reasonable and rational formula. Mathematical exactitude is not required.[48a] Approximation or, in the words of the applicable constitutional provision in Alabama, "as nearly equal * * * as

[47] *Gray v. Sanders, supra*, pp 830-1.

[48] Regardless of by whom elected, the representative in theory represents all persons within or a part of the unit from and by which he was elected, whether they be voters or non-voters, supporters or opponents.

[48a] *Sincock v. Duffy*, 215 F. Supp. 169, 184 (D. Dela., 1963).

may be." would grant equal protection and would satisfy the constitutional requirements.[49]

In view of the myriad possible apportionments, where representatives are elected by subdivision, geographical or otherwise, of the State, consistent with an apportionment policy based on numbers, well developed and familiar judicial standards under the Equal Protection Clause would be available to test and to determine the validity of such subdivision.[50] However, it is submitted that this would not necessarily be the minimum rationality test used in *Williamson v. Lee Optical* and similar cases, but, due to the mathematical nature of the policy, the subdivision could be definitely measured and tested. Also, unlike the state regulation at issue in *Williamson v. Lee Optical*, this is the type of state action which should be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment.[51]

(d) ***Equality of representation must mean equality in the entire legislative process.***

The legislative process in Alabama, by the 1901 Constitution, is placed in a legislature composed of two houses. Both houses are integral parts of this State's legislative process. Both may initiate legislation, except for taxation,[52] but neither by itself can enact legislation; however, either may reject or fail to act on a bill which has been approved by the other. Thus, the representative voice of the constituent citizens in the legislature must not only be equal in electing the members of each house,

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[49] See § 200, Article IX, 1901 Constitution; See also *Stiglitz v. Schardien*, 239 Ky. 799, 40 S.W. 2d 315, 321 (1931), and *Ragland v. Anderson*, 125 Ky. 141, 100 S.W. 865, 869 (1907).

[50] *Baker v. Carr, infra*, fn. 23; *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 US 483, 75 S Ct 461, 99 L ed 563 (1955).

[51] See fn. 4 to the Opinion of Mr. Justice Stone in *U. S. v. Carolene Products Co., infra*, fn. 44.

[52] See § 70, Article IV, 1901 Constitution.

but must be equal in the voice of each representative in each house. The constitutional mandate of equal protection means equal voice in the entire legislative process and not equal voice in only a portion thereof. One half equality is no equality. Having equality in one house would insure to a majority of the citizens, through election of a majority of the representatives, only a negative control or a veto over legislation and, at most, inaction.[53] However, inaction, through inability to enact a law or to change an existing one, may result in discrimination and even denial of equal protection of the law.[54] The purpose of government is to govern and this requires the ability to take affirmative action. Equal protection of the laws means the protection of equal laws, of laws that embody the principle of equality. This may be insured and protected, in the last analysis, by judicial review, but fundamentally, it should be present initially in the lawmaking process itself.

Minority process, which results when equality of representation in the lawmaking procedure is denied or diluted, is not due process. Protection of the rights of members of a minority is a legitimate concern of all three branches of a government. However, protection of the rights of members of a minority does not require that such minority control the government or even its lawmaking process. Derogation of the principle of majority rule by means of instituting minority control unduly restricts and may even stultify and clog the political and lawmaking processes. Restrictions on the majority,

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[53] Having been denied for a half a century their rightful voice in the Alabama Legislature, the citizens of the more populous areas of that State under such circumstances would perhaps be in a better position than they have been during that period but would still not be able to strike, or even merely amend, laws that, if not discriminatory against the majority, may not have represented their wishes or views.

[54] See *Nashville, Chattanooga & St. Louis Railway v. Walters*, 294 US 405, 415, 55 S Ct 486, 79 L ed 949, 955 (1935).

such as the requirement of extraordinary majorities for the enactment or adoption of certain laws or the requirement that certain types of legislation become effective only after certain time limitations or even after approval by more than one session of the legislature, although not derogating from the principle of majority rule, may be a means of insuring against precipitate action and of allowing for greater deliberation upon proposed legislation. It is through such methods, and not by means of unequal representation in, or minority control over, the legislative process, that the state may assure a proper diffusion of political initiative or control as between the various elements of its population.[55]

A bicameral legislature may presuppose a different basis of representation in each house. However, a study of the constitutional history of Alabama does not indicate that this is the predominant or even principal purpose of the bicameral legislature in that State. Rather, in this State, as in most other states having a bicameral legislature, its principal purpose is to serve as a part of the checks and balances found throughout the governmental organization and process. This valid function may be maintained in two houses without having either a different basis of representation in each or a minority control in one of the two houses. The checks and balances can be maintained by the devices previously mentioned, of extraordinary majorities for, or delay by one means or another in, the final adoption of legislation.[56]

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[55] *MacDougal v. Green*, 335 US 281, 284, 69 S Ct 1, 93 L ed 3, 7 (1948).

[56] See *Mann v. Davis*, 213 F. Supp. 577, 584-5 (E.D. Va., 1962).

4. ***The District Court failed to apportion, or to set out guidelines for the legislature to follow in apportioning, both houses of the legislature, according to the norm of population.***

The District Court determined that certain detailed requirements of the 1901 Constitution, which to some extent diluted and conflicted with the dominant theme of the Alabama Constitution that apportionment of the Legislature must be based on population, made "it obvious that in **neither** the house or the senate can representation be based strictly and entirely upon population."[57] However, it further held that "The result may well be that representation according to population **to some extent** must be required in **both** Houses if invidious discrimination in the legislative systems as a whole is to be avoided."[58] The Appellants sought and approved the Court's adoption of the "Equal Proportions Method" for apportionment as being the fairest mathematical formula.[59] However, as previously noted, the equality of the individual citizen is still not maintained where there is a provision that, regardless of population, each county must be assigned one representative. The Court recognized this conflict, but in its Decree accepted this provision with the consequent dilution of Plaintiffs' rights. There is nothing to indicate that a provision giving at

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[57] 208 F. Supp. 431, 439 (R. 150) (emphasis by the Court).

[58] 208 F. Supp. 431, 439 (R. 151) (emphasis by the Court). Appellants strongly urge that the District Court was correct in deciding that the question concerned invidious discrimination *"in the legislative systems as a whole."*

[59] By this method the difference between the representation of any two districts is the smallest possible when measured both by the relative difference in the average population per representative and by the relative difference in the individual share in the representative. See *"A Survey of Methods of Reapportionment in the Congress"*, by Edward B. Huntington, Department of Mathematics, Harvard University, Sen. Doc No. 304, 76th Congress, 3rd Session, cited in fn. 9 to the District Court's Opinion (p. 440) (R. 153). See also the description of the formula in Intervenor-Plaintiff's Amended Complaint (R. 86) and Appendix A to Affidavit of Intervening Plaintiff David J. Vann (R. 116-129).

least one representative to each county should override the dominant policy and constitutional principle of equality of the citizen in representation in the legislative process.

The county is the basic unit for determining geographical areas or districts from which representatives will be elected to the Alabama Legislature. In the House of Representatives, such district may be single or multi-representative, but it is never larger than one county. In the Senate, districts may be composed of one or more counties, but with not more than one senator from each district and, apparently, may not be smaller than a county. Just as counties may be grouped in forming a senatorial district in order to equalize the number of inhabitants in each district, so may the districts from which the representatives are elected be equalized by grouping contiguous counties. No doubt, the principal considerations, among others, behind the provision that each county should be entitled to one representative were (1) the maintenance of districts small in area and (2) the resulting close relationship between the representative therefrom and his constituents therein. However, these salutary purposes can be achieved without destroying the constitutional principle of equality in representation. Counties with a population less than the ratio which would entitle such county to at least one representative could be joined with an adjacent county or counties having a population entitling such county or counties to more than one representative, so that with the combined population the total number of representatives from such district would be approximately equal to the average ratio of representation in that house throughout the State. Coupled with this would be a provision that each county within such multi-county district would be entitled to have at least one of the several representatives from such

multi-county district be a resident of such county, although he be elected by the district as a whole, thus insuring each county that it would have at least one resident representative. However, each representative would be elected by, be responsible to, and represent voters of the district as a whole, thereby satisfying the constitutional requirement of equality of representation.[60]

The inadequacies of the apportionment of the Senate by the District Court is most glaring and was recognized by the Court itself. Prior to the reapportionment ordered by the District Court, a majority of the members of the Senate were elected from districts containing 25.1% of the State's population. After its reapportionment, a majority would be elected from districts containing 27.6% of the State's population, an improvement of only 2.6% (R. 152). Appellants strongly urge that not only is this not required by the pertinent provisions of the 1901 Constitution, but if so, they are patently in conflict with the constitutional standard.[61]

It is submitted that the requirement that no county shall be divided between two districts, which dates from the 1819 Constitution, means that no county could be

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[60] For example, in Alabama, with a house of 106 members, each representative should represent 30,607 inhabitants (R. 165). However, Washington County, with a population of only 15,372, would be joined with adjacent Mobile County, with a population of 314,301, to form a district, with a population of 329,673. This district should have 10 representatives, one of whom would be a resident of Washington County and the rest residents of Mobile County, although all would be elected by the district. However, the House of Representatives, without such a plan and under the fair method of equal proportions as used by the District Court, would have a majority of its members elected from counties containing 42.3% of the State's population. At the same time, the number of representatives in the House sufficient to block a proposed amendment to the Constitution of the State of Alabama, which requires a 3/5th vote of approval in each House, would be elected from counties containing only 28% of the State's population.

[61] As recognized by the District Court in its statement that "If the provisions of the State Constitution do not permit a single county to be divided into more than one senatorial district, such restriction would have to be held in conflict with the overriding requirement of equal protection of the laws provided by the Federal Constitution." 208 F. Supp. 431, 442 (R. 155).

divided so that a portion of such county could be added to another county or counties, or portions thereof, to form one district, and the remainder of such county would be added to another county or counties, or portions thereof, to form a second district, thereby preventing a county, otherwise entitled, from being a senatorial district in itself. Certainly, the inhabitants of a county would have no objection to dividing a county into more than one senatorial district and thereby increasing their representation and voice in the legislative process. The purpose of the constitutional prohibition was to protect the county by preserving its integrity as such and by preventing the dilution of the voting strength of its citizens that would result from dividing its citizens and representatives among districts composed principally of other counties. It was not intended, however, to prevent a county's being divided into self-contained districts, thereby obtaining additional representation to which it was entitled by its population.[62]

The final and overriding basis for this appeal is the failure of the District Court to set out the constitutional standard or norm, which must be followed by the State Legislature in reapportioning itself. As recognized by the District Court, the duty of reapportionment rests on the Legislature (R. 154), and the Court acted reluctantly in the matter and to a limited extent, but with the expressed hope that this limited reapportionment would release the stranglehold on the Legislature and permit it to reapportion itself. (R. 155) However, aside from the indirect references to the fact that to some extent both houses may have to be apportioned on the basis of popu-

[62] See *Ragland v. Anderson, infra*, fn. 49; but compare with *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932). Unlike the history of Virginia, as reported in the latter case, in which it had been an unbroken custom of that State to refrain from dividing any county or city into separate districts, Alabama during the period 1819 through 1865 did allow such divisions. See § 8 (Article III), 1819 Constitution (p. 56).

lation to meet constitutional standards, it did not set out the applicable constitutional standard. A misleading and erroneous principle or standard may have been set by its reference to *Toombs v. Fortson*, 205 F. Supp. 248 (N.D., Ga., 1962) and quotation therefrom to the effect that " * * * we do not find any authoritative decision by the Supreme Court that causes us to require that in order to give the plaintiff his constitutional rights the state legislature must be constituted of two Houses, both of which are elected according to population." (R. 150-1) and its reference to the *Maryland Committee for Fair Representation, et al. v. Tawes, Governor*, 228 Md. 412, 180 A. 2d 656 (1962) (R. 151), which held that the constitutional requirements were satisfied if only one house of a two-house legislature is apportioned on the basis of population. In order for the Legislature to constitutionally reapportion itself, the constitutional standards or norms should be set out for its guidance and adherence.

CONCLUSION

In conclusion, it is respectfully submitted that the District Court erred (1) in failing to apportion the House of Representatives of the Alabama Legislature on the basis of population by joining any county with a population insufficient to entitle it to at least one representative with an adjacent county or counties to form a district of such population that the inhabitants of such district would have representation in that House equal to that of other districts, (2) in failing to apportion the Senate of the Alabama Legislature on the basis of population by allowing counties with sufficient population to be divided into, or to comprise, more than one senatorial district, resulting in districts as nearly equal to each other in number of inhabitants as possible, and (3) in

failing to set out the Constitutional standards or norms, or guide lines thereto, for the guidance of the Legislature of Alabama, in reapportioning itself, and particularly, the constitutional proposition that **both** houses of the Alabama Legislature must be apportioned on the basis of population.

For that reason, and on the basis of the authorities hereinbefore cited, this proceeding should be remanded to the District Court with instructions to correct its Opinion and Decree in accordance with the Prayer for Relief made by Plaintiffs and with the applicable constitutional principles.

Respectfully submitted,

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Attorney for Appellants-Intervenors.

August 23, 1963.

PROOF OF SERVICE

I, JOHN W. McCONNELL, JR., the attorney for Appellants-Intervenors herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of August, 1963, I served copies of the foregoing Brief of Appellants-Intervenors on the several parties hereto, as follows:

1. On Bettye Frink, Secretary of State of the State of Alabama; B. A. Reynolds, Judge of Probate of Dallas County, Alabama; Frank Pearce, Judge of Probate of Marion County, Alabama, et al., Appellees-Defendants, by

mailing a copy in a duly addressed envelope, with first-class postage prepaid as follows:

(a) To Hon. Thomas G. Gayle, 1104-1/2 Water Avenue, Selma, Alabama; To Hon. Joseph E. Wilkinson, Jr., 310 Broad Street, Selma, Alabama; and To Hon. McLean Pitts, 15 Broad Street, Selma, Alabama, attorneys for Appellee Reynolds;

(b) To Hon. Rankin Fite, Hamilton, Alabama, attorney for Appellee Pearce;

(c) To Hon. Richmond Flowers, Attorney General, State of Alabama, Montgomery, Alabama, for Appellees Frink, et al.,

2. On M. O. Sims, et al., Appellees-Plaintiffs, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record, as follows:

(a) To. Hon. Charles Morgan, Jr., Bank for Savings Building, Birmingham, Alabama;

(b) To. Hon. George P. Taylor, 621 Frank Nelson Building, Birmingham, Alabama.

3. On R. E. Farr, et al., Appellees-Intervenors, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record, the Hon. Jerome A. Cooper, Bank for Savings Building, Birmingham, Alabama;

4. On David J. Vann, et al., Appellees-Intervenors, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record, as follows:

(a) The Hon. David J. Vann, 2100 Comer Building, Birmingham, Alabama;

(b) The Hon. Robert S. Vance, 1703 Comer Building, Birmingham, Alabama; and

(c) The Hon. C. H. Erskine Smith, First National Building, Birmingham, Alabama.

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APPENDIX A

1. 42 U.S.C. § 1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress."

2. Section 1, Fourteenth Amendment.

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

3. 1901 Constitution.

Article IV (Legislative Department)

> "Section 50. The Legislature shall consist of not more than thirty-five senators, and not more than one hundred and five members of the house of representatives, to be apportioned among the several districts and counties, as prescribed in this Constitution; provided that in addition to the above number of representatives, each new county hereafter created shall be entitled to one representative."

Article IX (Representation)

> "Section 197. The whole number of senators shall be not less than one-fourth or more than one-third of the whole number of representatives."

"Section 198. The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event each new county shall be entitled to one representative. The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken."

"Section 199. It shall be the duty of the legislature at its first session after the taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them, respectively, provided, that each county shall be entitled to at least one representative."

"Section 200. It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided, that counties created after the next preceding appor-

tioning session of the legislature may be attached to senatorial districts. No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other.

Article XVIII (Mode of Amending the Constitution).

"Section 284. * * * Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments."

4. Code of Alabama (1940, as amended), Title 32.

"Section 1. House of Representatives. The house of representatives of the legislature consists of one hundred and six members, distributed among the several counties as follows: The counties of Autauga, Baldwin, Bibb, Blount, Cherokee, Chilton, Choctaw, Clay, Cleburne, Coffee, Colbert, Conecuh, Coosa, Covington, Crenshaw, Cullman, Dale, DeKalb, Escambia, Fayette, Franklin, Geneva, Greene, Houston, Lamar, Lawrence, Limestone, Macon, Marion, Marshall, Monroe, Pickens, Randolph, Shelby, St. Clair, Washington, and Winston shall each elect one representative. The counties of Barbour, Bullock, Butler, Calhoun, Chambers, Clarke, Elmore, Etowah, Hale, Henry, Jackson, Lauderdale, Lee, Lowndes, Madison, Marengo, Morgan, Perry, Pike, Russell, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker and Wilcox shall each elect two representatives. The counties of Dallas and Mobile shall each elect three representatives. The county of Montgomery shall elect four representatives; and the county of Jefferson shall elect seven representatives.

"Section 2. Senatorial districts. The senate of the legislature shall consist of thirty-five members, and the state is divided into thirty-five senatorial

districts, as follows: First, Lauderdale and Limestone; second, Lawrence and Morgan; third, Blount, Cullman and Winston; fourth, Madison; fifth, Jackson and Marshall; sixth, Etowah and St. Clair; seventh, Calhoun; eighth, Talladega; ninth, Chambers and Randolph; tenth, Tallapoosa and Elmore; eleventh, Tuscaloosa; twelfth, Fayette, Lamar and Walker; thirteenth, Jefferson; fourteenth, Pickens and Sumter; fifteenth, Autauga, Chilton and Shelby; sixteenth, Lowndes; seventeenth, Butler, Conecuh, and Covington; eighteenth, Bibb and Perry; nineteenth, Choctaw, Clark and Washington; twentieth, Marengo; twenty-first, Baldwin, Escambia and Monroe; twenty-second, Wilcox; twenty-third, Dale and Geneva; twenty-fourth, Barbour; twenty-fifth, Coffee, Crenshaw and Pike; twenty-sixth, Bullock and Macon; twenty-seventh, Lee and Russell; twenty-eighth, Montgomery; twenty-ninth, Cherokee and DeKalb; thirtieth, Dallas; thirty-first, Colbert, Franklin and Marion; thirty-second, Greene and Hale; thirty-third, Mobile; thirty-fourth, Clay, Cleburne and Coosa; thirty-fifth, Henry and Houston."